DHA-15 (R10/97)

STATE OF WISCONSIN
Division of Hearings and Appeals

In the Matter of

(petitioner)
(petitioner address)

DECISION

MDV-66/46470

PRELIMINARY RECITALS

Pursuant to a petition filed October 20, 2000, under WI Stat § 49.45(5) and WI Admin Code § HA 3.03(1), to review a decision by the Washington County Dept. of Social Services in regards to Medical Assistance (MA), a hearing was held on December 27, 2000, at West Bend, Wisconsin. A hearing set for December 1, 2000, was rescheduled at the petitioner's request.

The issue for determination is whether the county agency correctly determined the beginning date of the petitioner's Institutional – MA due to a divestment penalty period.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:	Represented by:
(petitioner) (petitioner address)	David Norman, Attorney C/o David J. Hughes, S.C. 7000 W. North Avenue Milwaukee, WI 53213

Wisconsin Department of Health and Family Services
Division of Health Care Financing
1 West Wilson Street, Room 250
P.O. Box 309
Madison, WI 53707-0309
By: Maxine Ellis, ESS I
Rachel Stutzman, ESS
Washington County Dept Of Social Service
333 E. Washington Street
Suite 3100
West Bend, WI 53095

EXAMINER:
Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner (SSN xxx-xx-xxxx, CARES #xxxxxxxxxx) is an institutionalized resident of Washington County; she applied for Institutional – MA on or about September 13, 2000.

2. At application, or soon thereafter, the petitioner's representative submitted an invoice of expenses of the petitioner's power of attorney (POA), her daughter (petitioner' daughter), asserting that the POA had allowable expenses relating to her mother's financial affairs totaling $1,169.06 for a trip, by a commercial flight, to Wisconsin from California in December, 1999 (16 days); and for a second trip by the power of attorney (POA) daughter, and her husband, in which they rented a van and drove from California to Wisconsin in July & August, 2000 (24 days), to close out the petitioner's household after her institutionalization, at a total cost of $2,605.46 for the second trip. See, Exhibits #3 & #8, p.2.

3. The agency allowed the December, 1999, expenses of the POA in the amount requested, i.e., $1,196.06 (Airfare - $817.50 + Auto Rental - $351.56 = $1,169.56).

4. On October 10, 2000, the county agency issued a Notice of Decision to the petitioner informing her that the agency had determined the following: (a) that the petitioner had made a cash gift to a relative in July, 2000, which was a divestment of $7,660; (b) that only part of expenses of the petitioner's power of attorney (POA) daughter, and her husband, second trip from California to Wisconsin in July & August, 2000, would be allowed as expenses; (c) that a $1,500 payment made to Security Life Insurance of America for funeral expenses needed additional verification; and (d) that the agency would allow one half of the total it deemed reasonable expenses of $2,605.46 of the July/August trip by the daughter and husband, i.e., $1,302.73, meaning that the other half, $1,302.73 would be added to the $7,660 divested in July, 2000, resulting in a total divestment penalty period making the petitioner ineligible for Institutional – MA in July and August, 2000. See, Exhibits #1 & #2. Subsequently, the funeral expense issue was verified and resolved.

5. The petitioner filed an appeal with the Division of Hearings & Appeals on October 20, 2000, contesting the agency decision vis á vis the August, 2000, period of denial of Institutional – MA, only.

6. Subsequently, the county agency amended and corrected the amount of expenses for the July/August, 2000, trip that were allowed, decreasing the allowed expenses for the July/August, 2000, trip from $1,302.73, to $1,169.06, and increasing the disallowed expenses from $1,302.73 to $1,436.40. In essence, the county agency determined that the second trip was to be allowed at the same cost level as the December, 1999, trip by Mrs. Allvin alone.

7. The total amount determined divested by the county agency was $7,660 (cash to daughter in July, 2000) + $1,436.40 (disallowed portion of the July/August, 2000, trip) = $9,096.40. See, Exhibits #3 & #6.

8. The agency issued a Negative Notice on October 23, 2000, informing the petitioner that her application for Institutional – MA was denied for July & August, 2000, due to divestments in July & August, 2000; that she would be granted MA card services for that period of time; and that she had been determined first eligible for Institutional – MA, effective September 1, 2000. See, Exhibit #5.

9. At the hearing, the petitioner's representatives conceded that the agency was correct in counting the $7,660 cash gift made in July, 2000, as a divestment, but asserted that the agency had incorrectly processed the expense allowance for the July/August, 2000, trip by motor vehicle and should have allowed the balance of the $1,436.40 in expenses which were disallowed, as legitimate costs and services provided by the POA to (petitioner) and not divested funds.

10. At no time relevant since application has the petitioner's POA provided a statement of cares and services provided to (petitioner) since December 1, 1999, that sets forth hours of services or cares and the estimated hourly compensation she is due for actually performing such hours of services or care.

DISCUSSION

A person over 65 is eligible for medical assistance unless her liquid assets exceed $2,000. WI Stat § 49.47(4)(b)3g. A divestment occurs when an MA applicant, or person acting on the applicant's behalf, transfers otherwise available assets for less than fair market value during the lookback period. The lookback period is generally 36 months. WI Stat § 49.453(1)(f). Divesting assets renders MA recipients ineligible for MA for the number of months obtained by dividing the amount of disposed assets over the $2000 limit by the statewide average monthly cost to a private pay patient in a nursing home. WI Admin Code § HFS 103.065(5)(b); WI Stat § 49.453(3); see also, MA Handbook, App. 14.5.0. The then current average in August, 2000, was $3,833. MA Handbook, App. 14.5.0. Finally, payments to relatives by the applicant for care or services in the last 30 months are considered divestments unless one of the following exceptions is present:

1. The services directly benefited the institutionalized person.

2. The payment did not exceed reasonable compensation for the services provided.

   "Reasonable compensation" is the prevailing local market rate for the service at the time the service is provided.

MA Handbook, App. 14.8.0.

The petitioner's representatives were seeking MA eligibility for the August, 2000, portion of the originally requested backdate period of July & August, 2000. Her attorney did not cite to any provision of law in support of their position, merely adopting the county's proffered rubric that the amounts requested were "reasonable compensation" for the services provided. The agency determined that the petitioner had divested $9096.40. That determination resulted in two months of ineligibility, rather than one. (9,660 ÷ 3,833 = 2.52 months of ineligibility), rounded down to 2 months, i.e., July & August, 2000.

The agency representatives testified that they had determined that the large expenses reported for services provided by the daughter and spouse in the July/August, 2000, trip were not reasonable. Rather, the length of the trip, the fact that the POA rented a van for an extended trip rather than flying herself, the fact that her husband accompanied her, the extended stay, and the multiple meal expenses meant that at least some of the trip was to the benefit of the POA and husband as a type of a vacation and to bring back personalty from the petitioner's home, to California. The agency representatives testified that they determined that the reasonable compensation should have been at a level which was the same as the December, 1999, trip, i.e., $1,169.06. That part of the $2,605.46 claimed for the July/August, 2000, trip exceeding $1,169.06 was disallowed, i.e., $1,436.40. This was added to the $7,660 clearly divested in July, 2000, for the above recited total divested.

The agency also noted that some of the meals expenses included up to six persons in the bill; or were for entertainment type places like Cedarburg, Wisconsin, or Gurnee Mills IL (where a large factory outlet complex is located); and were of questionable nature.

The petitioner presented a statement from the POA, plus copies of most, if not all, of the expenses incurred in making the trip. The statement indicated that the purpose of the trip was because she was asked by the petitioner to come and dispose of her personal property, finalize her funeral arrangements, check on her medical progress, begin MA processing, assess her financial status, and encourage Ms. Hammer's overall socialization in the nursing home. See, Exhibit #3.

What the MA policy concerning payments to relatives, above, is all about is allowing paying reasonable compensation for *care and services* provided by the relatives in recent history prior to institutionalization. If

the care and services are longer term and higher cost, then a written agreement is required to evidence the same to be valid. See, MA Handbook, App. 14.8.0. It is not intended to be a means to seek reimbursement for all meals, mileage, transport, and lodging costs incurred by such relatives while coming to and from the situs of providing the services. The allowance is for *care and services* provided by the relatives to the faltering relative. This would normally be expressed by hours of services provided, at prevailing rates of pay for such care and services in the locality where provided. The petitioner's assets are not a "draw account" or "expense account" for the use of the POA or the relatives providing such care and services. The petitioner is to actually *account* for the hours of services and be paid reasonable rate of compensation for performing such cares or services.

In a Fair Hearing concerning the denial of a period of eligibility to a new applicant, the petitioner has the burden of proof to establish his or her eligibility for the period sought, and that the calculation action taken by the county was improper given the facts of the case. The burden of going forward then shifts to the county to rebut the petitioner's case and establish facts sufficient to overcome the petitioner's evidence of an incorrect action by the county agency in the denial of eligibility.

Based upon the foregoing, I must conclude that the petitioner has not established sufficient facts to establish that the county agency has made any error in the August eligibility denial action. The petitioner has failed to demonstrate that the hours of care and services provided by her and her husband to (petitioner), at a locally prevailing rate of reasonable compensation, have actually been provided such that the amount credited to the provision of these services by the county was incorrect. Nor has she shown that there was in any way a verbal contract with (petitioner) to reimburse the (petitioner's family)for any and all expenses incurred in making the trip for three weeks by motor vehicle. In addition, it is clear that, as noted by the county agency, a local POA was also authorized to act for (petitioner), and had been in fact doing so. See, Exhibit #1. Finally, it is clear that more than half of the expenses incurred arise out of the simple fact that the POA made the choice to drive instead of fly in order to cart home personalty to her benefit. There was no reason why such goods could not have been disposed of locally, except for the fact that the daughter wanted these things, understandably, as keepsakes of her family. That does not mean, however, that the MA Program is going to subsidize her ability to do so. In fact, it is not at all clear that the POA was not *overcompensated* for her services by the agency's reliance on the reported transportation costs to measure the value of the allowable care and services payments in computing the divested amount. Appendix 14.8.0 is about payments for *acts* done by family members in *caring for and serving* MA applicants prior to application and/or institutionalization; it is not carte blanche to recover expenses incurred by family members in coming "home" to do so.

The petition for review is dismissed as the petitioner has not met her burden of proof to show that she was eligible for MA in August, 2000.

CONCLUSIONS OF LAW

The county agency correctly determined that the petitioner divested $9,096.40 to family members during the lookback period, and that she was not eligible for Institutional – MA in July or August, 2000.

NOW, THEREFORE, it is ORDERED

That the petition for review herein be, and the same hereby is, dismissed.

REQUEST FOR A NEW HEARING

This is a final fair hearing decision. If you think this decision is based on a serious mistake in the facts or the law, you may request a new hearing. You may also ask for a new hearing if you have found new

evidence that would change the decision. To ask for a new hearing, send a written request to the Division of Hearings and Appeals, P.O. Box 7875, Madison, WI 53707-7875.

Send a copy of your request to the other people named in this decision as "PARTIES IN INTEREST."

Your request must explain what mistake the examiner made and why it is important or you must describe your new evidence and tell why you did not have it at your first hearing. If you do not explain these things, your request will have to be denied.

Your request for a new hearing must be received no later than twenty (20) days after the date of this decision. Late requests cannot be granted. The process for asking for a new hearing is in sec. 227.49 of the state statutes. A copy of the statutes can found at your local library or courthouse.

APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed no more than thirty (30) days after the date of this hearing decision (or 30 days after a denial of rehearing, if you ask for one).

Appeals for benefits concerning Medical Assistance (MA) must be served on Department of Health and Family Services, P.O. Box 7850, Madison, WI, 53707-7850, as respondent.

The appeal must also be served on the other "PARTIES IN INTEREST" named in this decision. The process for Court appeals is in sec. 227.53 of the statutes.

Given under my hand at the City of Madison, Wisconsin, this _____ day of _____, 2001.

Kenneth D. Duren
Administrative Law Judge
Division of Hearings and Appeals
126/KDD

cc: WASHINGTON COUNTY DEPT OF SOCIAL SERVICES
DHFS - Susan Wood
Bonnie Riesing - Certified Financial Services Inc.
David Norman, Petr's Attorney